RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD, and JACK PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG, and DAVID MULLINS,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF *AMICI CURIAE* OF THE NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, AND CONGRESSIONAL PRAYER CAUCUS FOUNDATION

in support of the Petitioners and urging reversal

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INTERESTS OF *AMICI CURIAE*[1]

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Colorado, seek to ensure that those with a religiously based view of marriage continue to be free to express those views without being compelled to express the opposite view by state-enforced association with those holding that opposite view.

The Pacific Justice Institute (PJI) is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold traditional views of marriage and family. As such, PJI has a strong interest in the development of the law in this area.

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[1] All Parties have consented to the filing of this Brief. Counsel of Record for the Petitioners has filed a blanket letter of consent with this Court, as has Counsel of Record for Respondent, Colorado Civil Rights Commission. Written consent from Counsel of Record for the remaining Respondents accompanies this Brief. No Counsel for any Party authored this Brief in whole or in part, and no Counsel or Party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity other than *Amici*, their members, and their Counsel made a monetary contribution intended to fund the preparation or submission of this Brief.

The Congressional Prayer Caucus Foundation (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government coercion and punishment forcing them to endorse different messages that violate their convictions by either speech or association. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-three states.

SUMMARY OF THE ARGUMENT

The central fact of this case is that a marriage ceremony is a communal, expressive event. Thus, this case is principally about what the brides or grooms (and the State) are communicating when they get married. It is about the marriage *event*, and the message that event publishes to the community. Thus, the question of whether Colorado's Anti-discrimination Act (CADA) violates the *vendor's* free speech and free exercise rights is inextricably bound up with another aspect of CADA, the consideration of which is required for the resolution of this case: the State is compelling the vendor to associate with, and facilitate, the *message* of his *customers* that the vendor finds offensive.

Does a law prohibiting religious discrimination require a Jewish restauranteur to cater a Muslim gala with the announced purpose of fundraising for those fighting for the abolition of the State of Israel? It does not, because the restauranteur objects, not to Muslims per se, but to their message of the gala, a message with which he does not want to associate or facilitate.

So it is here. Vendors may be engaged in doing something artistic like arranging flowers or decorating cakes, as is the baker here. Other vendors may be involved in something menial like providing rental tables and chairs. While those engaged in artistic endeavors will also have their free speech and free exercise rights violated by CADA, *all* vendors, artistic and non-artistic, including the baker here, will have their associational rights violated whenever the vendor has a sincere objection to supporting the message being communicated by the *recipient* of the services. No vendor may be compelled to join that assembly and associate with that message. The most relevant speech in this case is that proclaimed from the altar by the wedding participants (and the State) that a same-sex marriage is a type of marriage that should be celebrated and approved. Those who disagree with that message, especially if they disagree from a religious perspective like the baker here, may not constitutionally be compelled to assemble for the purpose of joining or facilitating that message or face being punished for refusing to do so.[2]

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[2] The Petitioners preserved this argument below, *see* Cross-motion at Agency for Sum. Judg. at 7-19 (*available at* http://www.adfmedia.org/files/MasterpieceSJbrief.pdf), Appellant's Opening Br. at Col. Ct. App. at 6-20 (*available at id.*), but it was rejected by the Administrative Law Judge and (Continued)

ARGUMENT

The baker in this case does not object to serving homosexuals, including those already in a same-sex marriage. (Appx. 276a.) Rather, he objects to associating with and facilitating a same-sex marriage ceremony and the message the ceremony conveys. (Appx. 274-277a.) His objection in this instance is based on sincerely held religious convictions that it would be ethically wrong for him to associate with and to help foster such a ceremony and its particular message. That is what is being objected to in this case, and whether his refusal to service an event because it communicates a message objectionable to him can be punished constitutionally is the key consideration that should be addressed and decided.

I. The Wedding Participants, and the State, Are Communicating a Message in the Same-Sex Marriage Ceremony.

By engaging in a marriage ceremony, both the same-sex wedding participants and the State are broadcasting a clear message. That message is not just that marriage, in the abstract, is a good and valued institution. The message is a more particular endorsement: that same-sex couples are entitled to engage in such unions with the State's full blessing.

As this Court recounted in the various opinions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), whether same-sex marriage is a legitimate form of marriage is an issue that deeply divides the citizens

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the state appeals court. ALJ Op. at 4-9 (in Appendix at 68a-79a); Ct. Op. at 12-24 (in Appendix at 12a-22a).

of this country. A same-sex marriage ceremony is divisive precisely because it "makes a statement," just as the denial of the right to marry by same-sex couples communicated the message that such marriages were illegitimate. As the majority noted in *Obergefell*, without being able to marry with the sanction of the State, "[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken." *Id.* at 2596. Moreover, same-sex couples were "burdened in their rights to associate." *Id.* Conversely, permitting same-sex couples to marry allows them to proclaim that their relationship is "sacred," at least by their own definition, *id.* at 2599, and to associate to the same extent as heterosexual couples.

That the State is also communicating its own message by prohibiting or sanctioning a same-sex marriage ceremony was also emphasized by this Court in *Obergefell*, as well as in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Stated negatively, this Court held that, when the Federal Government only recognized heterosexual marriages, it "impermissibly disparaged those same-sex couples 'who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.'" *Obergefell*, 135 S. Ct. at 2597 (quoting *Windsor*, 133 S. Ct. at 2689). Stated positively, this Court recognized that, during a marriage ceremony, "just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union." *Id.* at 2601. "The right to marry [with legal sanction] thus dignifies couples who 'wish to define themselves by their commitment to each other.'" *Id.* at 2600 (quoting *Windsor*, 133 S. Ct. at 2689). Simply put, this Court

recognized that the marriage ceremony is both an individual and a societal statement most fundamental.

II. The Vendor Has a Sincere Objection to the Message of the Wedding Ceremony.

This Court in *Obergefell* also recognized that many in our country do not agree with these messages that same-sex marriage is either morally permissible or good social policy. This Court noted, "Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world. " *Id.* at 2594. And, again, the *Obergefell* majority observed, "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. " *Id.* at 2602.

It is not disputed in this case that the baker is one of those who sincerely believes that same-sex marriage is wrong and that, by facilitating such a ceremony, he would associate with and be announcing his support for it, contrary to his convictions. (Appx. 274-77a.) *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) (holding that a court may not judge the reasonableness of a sincere religious belief). He comes to that belief "based on decent and honorable religious or philosophical premises." *Obergefell*, 135 S. Ct. at 2602. But, unlike this Court, which took pains in *Obergefell* not to disparage such beliefs, the lower tribunals here have both disparaged and punished the baker for his holding and acting upon his beliefs by refusing to participate in a same-sex marriage ceremony.

Whether that is constitutionally permissible is the question presented on these facts.

III. The Vendor Is Not Discriminating on the Basis of "Sexual Orientation."

The record is clear in this case that the baker did not discriminate against the wedding participants because of their sexual orientation. He was quite willing to serve them, despite being aware of their sexual orientation, in a non-marriage context. The baker had no objection to serving homosexuals, even those already in a same-sex marriage, but only to participate in a same-sex marriage ceremony. (Appx 274-276a.) Such participation by assisting the ceremony with his services, just like the State's licensing, would send a message to others of acceptance and approval, "offering symbolic recognition and material benefits to protect and nourish the union." *Id.* at 2601. And it does that in a way that is not present in the mere exchange of goods and services disassociated from the ceremonial event.

This would be similar to an African-American restauranteur serving Caucasians regularly in his restaurant, but refusing to cater their Ku Klux Klan banquet. In this situation, the refusal is tied not to the race of the customer, but to the message that will be communicated at the event. It is not a rejection of all Caucasians, but a refusal to become associated with or to facilitate a racist ideology. Indeed, the Colorado Civil Rights Commission has itself recognized this important distinction in several other contexts. (Appx. 78a, 297a-331a.)

The same is true here. The baker only refused to participate in the message communicated during the same-sex marriage. He did not refuse service on

the basis of sexual orientation, but on the basis of the desire (indeed, the ethical imperative in his case) not to become associated with, or to assist in communicating, a message with which he disagreed and that would, in his view, directly indicate his support for that message. In this respect, the ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), controls. There, this Court held that, when parade organizers refused to let LGBT individuals march with them, it was not because they wished "to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner," expressing an unwanted message at the event. *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (summarizing and quoting *Hurley*, 515 U.S. at 574-75). The same is true here: the baker refused to service the same-sex marriage not because the grooms were homosexual, but because of the message the marriage communicated.

IV. Non-discrimination Laws Used in This Way Unconstitutionally Compel Speech and Assembly by Forcing the Vendor to Associate with and Facilitate the Ceremony's Message or Punishing the Refusal to Do So.

Even assuming that it violated the non-discrimination laws for a black restauranteur to refuse to cater a Ku Klux Klan banquet or a white one to refuse to cater a Black Muslim gala, the restauranteurs would have a valid defense to being punished for their refusals. That is because they would be exercising their own constitutional rights not to associate with or to facilitate racist messages. By requiring such association and facilitation on pain of

monetary damages, the State would unconstitutionally compel speech and assembly. The same is true here for this baker. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (holding that conditioning a grant on compelled speech is unconstitutional).

This Court in *Obergefell* took pains to explain that it understood the very situation in which this baker finds himself and that, by ruling that States could not deny homosexual couples a marriage license, it did not intend to infringe on the First Amendment rights of those who would object for religious or other sincere reasons:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

135 S. Ct. at 2607. Like the liberty interest to define one's own identity that this Court found controlling in *Obergefell*, *id.* at 2593, 2599, individuals have a liberty interest, founded both in the First and Fourteenth Amendments, not to be compelled to propagate or advocate a message they find ethically objectionable. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find

morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The baker here could service the same-sex marriage ceremony "only at the price of evident hypocrisy. " *All. for Open Soc'y*, 133 S. Ct. at 2331.

Laws "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). Indeed, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves . . . . The First Amendment protects 'the decision of both what to say and what not to say.'" *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (quoting *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988)).

The freedom of assembly, although a free-standing right, is a close cousin of the freedom of speech. Quite commonly, individuals exercise their freedom of speech by gathering in groups. Conversely, by restricting the access of individuals to each other, their rights to free speech can be restricted or eliminated altogether. The two rights, then, often do their essential work in tandem. *See NAACP v. Ala.*, 357 U.S. 449, 460 (1958) ("this Court has more than once recognized . . . the close nexus between the freedoms of speech and assembly"); *Thomas v. Collins*, 323 U.S. 516 (1945) (noting that rights of the speaker and audience are "necessarily correlative"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"); *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis,

J., concurring in the result) ("without free speech and assembly discussion would be futile"), *majority opinion overruled on other grounds, Brandenburg v. Ohio*, 395 U.S. 444 (1969). Furthermore, the right of association is also implicated in the outworking of these rights: "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'" *NAACP. v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

In its celebrated decision in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court illustrated this conjoining of the rights of speech and assembly. State law required assembled school children to participate in a ceremony upon pain of expulsion and other punishment, the ceremony being the salute of the nation's flag during the pledge of allegiance. This Court first noted that such ceremonies involve speech:

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."

Id. at 632-33; *see also Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (holding that armband was symbolic speech the government could not prohibit).

The *Barnette* Court then observed that the First Amendment covers compelled speech as well as voluntary speech: "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own

mind, left it open to public authorities to compel him to utter what is not in his mind." 319 U.S. at 634. This Court then found this compelled speech and assembly unconstitutional, in ringing prose:

> One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . . [F]reedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.
>
> . . . .
>
> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.
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> . . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 638-39, 641-42.

Barnette controls here. The State, through its non-discrimination laws, is trying to force an indi-

vidual with religious objections to facilitate and support a ceremony with great symbolic significance. Just as the school children objected to assembling with those saluting the flag, the baker objects to being associated with a marriage he considers improper because it implies his consent to, and approval of, the message of the event. The First Amendment freedoms of speech and assembly "deny those in power any legal opportunity to coerce that consent." *Id.* at 641. No officials may "force citizens to confess by word or act" the "orthodox" position in "religion[ ] or other matters of opinion." *Id.* at 642.

What the lower tribunals did here is also more egregious than that found objectionable in *Hurley* and *Dale*. In *Hurley*, this Court, noting that the First Amendment protects speakers' right to "decide what not to say," held that the homosexual group could not, by use of non-discrimination laws, force itself into a parade and proclaim a message contrary to that intended or desired by the organizers of the parade. 515 U.S. at 568-81. Here, the organizers of the same-sex marriage were trying to force the unwilling vendor to assist the ceremony, even though it communicates a message offensive to him. Similarly, in *Dale*, this Court upheld the right of an organization, despite non-discrimination laws, to disassociate with an openly homosexual individual because he began to voice opinions contrary to the message of the organization. 530 U.S. at 656-61. Here, the baker is not trying to force his way into the same-sex celebration to express a contrary opinion about marriage, but only to be allowed to absent himself so as not to be associated with the celebration in the first place and to guard against being viewed as supporting or facilitating the celebration's message. If the organizations in *Hurley* and *Dale* had the right to refuse to associate

with a message with which they disagreed, despite the non-discrimination laws, surely this baker has a right not to be forced on pain of financial ruin to associate with or support a message with which he has moral objections.

This case provides an appropriate counterpoint to *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"). The law schools claimed that they were being unconstitutionally compelled to associate with speech with which they disagreed by the federal law that linked grants to allowing the military to recruit along with multiple other organizations and firms on campus. In that circumstance, there was no valid compelled speech and association claim because the forum was an open one in which many with different viewpoints came to speak and no one could validly claim that a law school was approving of or fostering all the different viewpoints simultaneously, rather than just providing a forum for the speech of others, leaving the law schools free to articulate their views in the same forum. *Id.* at 65 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."). Similarly, in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), this Court upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property, but only because there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was "not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view." *Id.* at 88.

A wedding is not an open forum where different views can appropriately be expressed, as in *FAIR* and *PruneYard*. All who participate presumably do so to communicate their approval of the wedding's overriding message. Moreover, unlike in *FAIR*, here the baker is trying to *avoid* having a message attributed to him and from affirming the event's overriding message, rather than attempting to force his attendance when it is being resisted, as the Government was doing via the Solomon Amendment. Compelling the baker to facilitate the wedding celebration concerning which he has religious scruples is personal, focused, compelled speech. It is unconstitutional. *See Wooley*, 430 U.S. at 717 (1977) (holding State could not require Jehovah's Witness adherent to communicate a motto to which he had religious scruples).

A helpful analogy is found in the rule that a fair share " of mandatory union dues cannot include those that support political causes to which the non-union employee objects without violating the employee's constitutional rights of assembly, association, and speech. A union cannot, "consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis* v. *Railway Clerks*, 466 U.S. 435, 447 (1984); *accord Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977). This Court has "recognized that requiring non-union employees to support their collective-bargaining representative 'has an impact upon their First Amendment interests,' and may well 'interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit . . . .'" *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 301 (1986) (quot-

ing *Abood*, 431 U.S. at 222). Similarly here, the government cannot penalize an individual for refusing to service and associate with an event when the vendor has a religious objection to the message the event communicates.

CONCLUSION

A Muslim merchant cannot constitutionally be punished for racial discrimination for his refusal to service a State of Israel fundraiser. Nor can this baker properly be compelled to associate with and foster a wedding ceremony he finds morally objectionable, or be penalized for refusing to do so. This Court should reverse the decision of the Colorado Court of Appeals.

Respectfully submitted,
this 7th day of September, 2017

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